

DOCUMENT RESUME

ED 217 429

CS 206 946

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 TITLE Freedom of Science Information under Federal Law.
 PUB DATE Jul 82
 NOTE 22p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (65th, Athens, OH, July 25-28, 1982).

EDRS PRICE MF01/PC01 Plus Postage.
 DESCRIPTORS *Academic Freedom; Confidentiality; Confidential Records; Court Litigation; *Disclosure; *Federal Legislation; Freedom of Speech; Government Publications; Grants; Higher Education; Information Dissemination; Information Seeking; *Information Sources; Journalism; *News Reporting; Program Proposals; Public Agencies; Research Reports; *Scientific Research
 IDENTIFIERS *Freedom of Information Act; News Sources

ABSTRACT

The Freedom of Information Act (FOIA) is a limited tool for science reporters seeking information about federally funded university research. The act applies only to information that is considered a "record" in possession of an "agency," both as defined by the act. Most university research and most universities do not meet the requirements of these definitions. In "Washington v. Hew," however, the courts ruled that FOIA did apply to grant applications and progress reports submitted to the federal government. Less encouraging for science reporters is the Supreme Court's ruling in "Forsham v. Harris," in which the court decided that raw data and other materials describing the inner workings of research projects are disclosable only if a federal agency actually has possession of them. A survey of the nine exemptions built into the FOIA reveals mixed possibilities, but basically a scientist can keep sensitive material from falling under the provisions of the FOIA by merely keeping it out of documents submitted to the federal government. But with the access to grant applications and progress reports provided by the FOIA and the even greater access to public universities available through the open records laws of most states, the science reporter does have good opportunities for articles on science research. (JL)

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Freedom of Science Information under Federal Law

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Presented to the Mass Communications and Society Division and the
Science Writers Educators Group, Association for Education in
Journalism annual convention, Athens, Ohio, July 1982.

Freedom of Science Information under Federal Law

INTRODUCTION

About half of the money the federal government spends on basic research each year goes to scientific projects at universities.¹ Assuming that such research has potential news value, it's worth considering how much information about such projects science reporters can obtain by using the federal Freedom of Information Act (FOIA).²

Generally, science reporters are not locked in adversarial relationships with the researchers whose work they write about, but differences over access to information can and do occur.³ In such cases, a reporter may consider using the FOIA to try to obtain information that a scientist has been unwilling to provide.

The public interest in such information can be substantial. University researchers are at the forefront of important developments in energy, medicine, and agriculture, to name only the most-publicized fields. The federal government, recognizing the importance of such work, has become the leading patron of scientific research at universities.⁴

With federal money comes a federal interest in the policy implications of research findings, and leading scientists are regularly asked to contribute to the development of governmental policy. Indeed, the role of university faculty members in American society has evolved to the point that one respected newspaper described it in almost reverent terms.

Professors, after all, are among society's new elite, people of influence and prestige. Within a generation they have moved from the ivory tower into the world. Flanked by imposing looking diplomas, reflecting the brilliance of the universities they serve, they increasingly are sought by the public, industry, and government to help shed light on puzzling modern problems.⁵

The importance of the research conducted on their campuses is not lost on the universities. They tout it in their press releases, student-recruitment

brochures, and lobbying efforts in the halls of government. At the faculty level, a successful research program has become a de facto prerequisite for the cherished job security of tenure at most major universities.

Despite the virtually unanimous agreement that federally funded university research is important to society, however, science reporters who use the FOIA in an effort to gain access to information about such research are likely to find that the law is not a particularly powerful tool for that purpose.

BACKGROUND

Citizens' information-gathering is not without First Amendment support,⁶ but the Supreme Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within governmental control," the court said in Houchins v. KQED, a 1978 decision.⁷

In the absence of a clear First Amendment right, determining what kinds of information must be available to the public is "clearly a legislative task," the Houchins ruling added.⁸ Accordingly, citizen access to governmental information hinges on what former Supreme Court Justice Potter Stewart once called "the tug and pull of the political forces in American society."⁹

In 1966 those political forces produced the federal Freedom of Information Act,¹⁰ which created a strong legal presumption that information about federal activity should be available to the public. A series of amendments in 1974 strengthened the act, which has been the principal legal instrument used by citizens seeking access to information about federally funded university research.

Concern over the issue of how much information about scientific research must be available to the public has its recent roots in Washington Research Project v. HEW, which stemmed from an FOIA demand for information about 11 projects funded by the National Institute of Mental Health, all of which dealt with the effects of various drugs on the behavior of learning-disabled children. The District of Columbia Court of Appeals ruled that the FOIA requires certain

information about university research -- basically, grant applications and progress reports submitted to the federal government -- to be made public on demand.¹¹ In 1975 the Supreme Court declined to review the lower court ruling,¹² and since then several scientific groups have urged legislative action to limit the types of information about research that must be disclosed under the FOIA.

In 1976, for example, the President's Biomedical Research Panel attacked what it called "unrestricted disclosure" of information submitted to the federal agencies that fund scientists' research. "It is clear," the panel said, "that the present policy of complete 'openness' ensures public accountability at the cost of sacrificing protection of intellectual property rights of demonstrable potential benefit to the nation."¹³

A year later the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research also advocated pulling back from the disclosure mandates of the Washington Research Project ruling. The commission acknowledged that disclosing information about research furthered the goals of open government, free exchange of scientific ideas, and protection of human subjects in research.¹⁴ However, the commission gave greater weight to arguments in favor of keeping virtually everything but final research reports secret. Those arguments included: protecting a researcher's intellectual property, which the commission called his or her "stock in trade"; protecting patent and other commercial interests; possible invasion of the researcher's privacy; maintaining the integrity of the peer-review system; and possible public misunderstanding that might stem from the disclosure of research hypotheses or raw data.¹⁵

The scientists' recommendations for statutory change weren't adopted by Congress, however, and although the Reagan administration's recent proposals to revamp the FOIA are controversial, they apparently wouldn't change the law with respect to most university research information.¹⁶ In addition, there don't seem to be any cases in the federal-court pipeline that have significant

potential to affect the way appeals courts have interpreted the FOIA with respect to information about university research.

For the time being, in other words, the law in this area is pretty well settled. It's the purpose of this paper to explore where the courts have drawn the line between disclosure and secrecy under the FOIA, and what their rationales have been.

GENERAL SCOPE OF THE FOIA

Before the adoption of the FOIA, people seeking access to federal documents had no general statutory support other than Section 3 of the Administrative Practice Act of 1946, which provided in part that: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

The lack of definition of key terms in this section gave the custodians of federal documents extraordinary discretion over whether to make them public. For example, the act failed to specify what classes of documents were "matters of official record," it gave no indication how someone became "properly and directly concerned," and it outlined no criteria for a "good cause" determination that something should be kept confidential.¹⁷

Not surprisingly, the government's disclosure policy under the 1946 law was erratic at best. "Section 3 was generally recognized as falling far short of its disclosure goals, and came to be looked upon more as a withholding statute than a disclosure statute," the Supreme Court noted in EPA v. Mink, a 1973 interpretation of the FOIA.¹⁸

The FOIA swept away many of the deficiencies of the 1946 law. Under the FOIA, people who wanted access to information no longer have to show that they are "properly and directly concerned." The FOIA simply requires disclosure to "any person."

A public interest in speedy disclosure is also recognized by the FOIA. Except for other cases of overriding importance, the act directs federal district courts to give FOIA lawsuits "precedence on the docket over all other causes," adding that such lawsuits "be assigned for hearing and trial at the earliest practicable date and expedited in every way."

The FOIA requires all executive and regulatory agency documents to be available to the public except those that fall into nine fairly specific categories.¹⁹ And if an agency wants to keep material secret, the legal burden is on the agency to show that at least one of the nine exemptions applies to the information.²⁰

The types of information the FOIA exempts from mandatory disclosure include, among others: national-security materials; trade secrets and other confidential commercial information; sensitive personnel data; and investigatory files compiled for law-enforcement purposes.

All in all, the FOIA is a strong policy statement in favor of openness. But it does not make all non-exempt information available to the public under all circumstances. For example, the information sought has to be an identifiable "record," and the record has to be in the possession of an "agency," as defined by the law and the court decisions interpreting it.

In short, the law says that all information about university research must be made public on demand except: (a) things that aren't "identifiable records"; (b) things that are identifiable records but aren't in the possession of an "agency"; and (c) identifiable records in the possession of an agency that may nonetheless be kept secret because they fall within the reach of one of the FOIA's exemptions.

WHEN IS INFORMATION A "RECORD?"

The FOIA applies only to information that is considered to be a "record" for purposes of the law. Unfortunately, neither the language of the statute nor the court decisions interpreting it have clearly defined "record," although it's

clear that not every bit of information linked to the federal government is a "record" under the FOIA.

For example, the Supreme Court recently said that the "Freedom of Information Act deals with 'agency records,' not information in the abstract," adding that the law applies to "records which have been in fact obtained, and not to records which merely could have been obtained."²¹ Likewise, the FOIA doesn't require an agency to obtain or create records,²² and it is uncertain that information is a "record" when an agency had a legal duty to obtain it but didn't.²³ Nor are materials that have been created by an agency or that are in the physical custody of an agency always "records."²⁴ Finally, there's a class of government documents called "nonrecord materials."²⁵ The Supreme Court recently noted that "it has not been settled whether the FOIA definition of agency records extends to 'nonrecord materials.'"²⁶

In general, though, the central question in FOIA actions has not been whether the information sought is a "record." Rather, defendants have tended to claim either that they aren't an "agency" for FOIA purposes, or that they are an agency but that the information sought is exempt from mandatory disclosure under one or more of the FOIA exemptions.

"AGENCY" DEFINED

Only federal "agencies" are subject to the disclosure mandates of the FOIA, which defines agency as "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency." Thus, with the exception of the few federal universities,²⁷ the FOIA is useless to people seeking research information directly from universities. Public universities are agencies of the states, not of the federal government, and private universities are not governmental agencies at all.

A less obvious conclusion is that pockets of intense federal activity within universities are not "agencies" for FOIA purposes. Even though their research may be funded by federal dollars and the federal government may to an extent supervise their work, university scientists and research groups don't come within the meaning of "agency."

In 1980, for example, the Supreme Court rejected a claim that the records of a federally funded university research project were agency records subject to disclosure under the FOIA.

The case -- Forsham v. Harris -- involved information generated by the University Group Diabetes Program (UGDP), which was a long-term study of the effectiveness of various treatments for diabetes. A group of doctors who questioned the project's findings claimed that the UGDP raw data were agency records because the funding agency (the federal Department of Health, Education, and Welfare) exercised some supervision over the research and had rights of access to and ownership of the data, if it so desired.

In addition, the federal Food and Drug Administration had relied on the project's findings in deciding to try to limit the use of certain drugs. Therefore, the doctors urged that the raw research data, even though they had not been directly used by the FDA, should be considered FDA agency records and should be released on demand.

The Supreme Court rejected both contentions. UGDP was not an agency because "grants of federal funds generally do not create a partnership of joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts into government acts absent extensive, detailed and virtually day-to-day supervision."²⁸ HEW, which is clearly an agency, never exercised either its right to audit the data or to take possession of them, so the project's raw data weren't HEW agency records.

In a similar vein, the court ruled that the FDA's use of the project's findings didn't by itself convert the raw research data into FDA agency records.

"Reliance on a document does not make it an agency record if it has not been created or obtained by a federal agency," the court said.²⁹ A small amount of data actually reviewed by the FDA was subject to the FOIA, but it had been made available to the doctors before the case reached the Supreme Court.

The message of Forsham v. Harris -- the only case involving a demand for university research information ever to reach the Supreme Court -- is not an overly cheery one for science reporters and others who might actively seek information about the inner workings of a university research project. The FOIA doesn't pry information directly from scientists or universities, where the raw data and other inside information tend to be. The law can help citizens obtain research information from federal agencies, but only if the agency has directly used or reviewed the information. Often the agency hasn't done that, even though funding agencies usually have the right to audit and take possession of raw data and other research information.

FOIA EXEMPTIONS AND RESEARCH

If information is an identifiable agency record, an agency nonetheless may keep it secret if it falls within one of the nine categories of information the FOIA exempts from mandatory disclosure. Some of the categories are arguably broad enough to embrace certain kinds of information about research at universities.

EXEMPTION 1 -- National security information may be kept secret under this exemption, which allows withholding materials that are "(A) specifically authorized under criteria by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

Most university research is unclassified and has no direct foreign-policy implications. However, the Reagan administration has proposed an executive order that would make it easier for the government to classify research "relating to the national security," raising fears among scientists that "we will

see progressively tighter government controls imposed on scientific communication."³⁰

University scientists conduct hundreds of millions of dollars worth of military research annually, some of which is classified and almost certainly could be withheld from disclosure under Exemption 1.³¹ However, no reported court decisions have directly considered the reach of Exemption 1 with respect to university research information.

EXEMPTION 2 -- "Material related solely to the internal personnel rules and practices of an agency" may be withheld under Exemption 2 of the FOIA, an exemption that has been called nothing more than a housekeeping statute that would not allow withholding information of a "genuine and significant public interest."³²

Because of the significant public interest in federally funded university research, it's unlikely that Exemption 2 could be used to bar public access to information about such research. As the Supreme Court said in 1976: "The general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."³³

EXEMPTION 3 -- If other laws require or suggest that information be withheld, the information is exempt from the mandatory disclosure provisions of the FOIA. Exemption 3 allows material to be kept secret if it is: "Specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

More than 100 federal statutes or parts of statutes restrict public access to specific types of records.³⁴ The most widely cited of these with respect to the FOIA is the Trade Secrets Act, which provides for criminal penalties against government employees or agencies that release, to any extent "not

authorized by law," information about "trade secrets, processes, operations, style of work, or apparatus."³⁵

The Trade Secrets Act gained special status in disclosure cases in 1979 when the Supreme Court ruled that the FOIA's exemptions aren't mandatory bars to disclosure. If agencies want to release information in response to an FOIA request, the FOIA gives the submitter of the information no right to sue to block disclosure, the court ruled in Chrysler v. Brown.³⁶

At the same time, however, the court held that submitters of information could sue to block disclosure if disclosure would violate the Trade Secrets Act.³⁷ Such judicial review of an agency's disclosure decision would be brought under Section 10 of the Administrative Procedure Act.³⁸

Although the Chrysler holding was limited to a right of review because of possible agency violation of the Trade Secrets Act, the logic of the decision implies that possible violations of other so-called "exempting statutes" could bring into play the right of judicial review of an agency's disclosure decision.

Indeed, since the Supreme Court's Chrysler ruling, lower courts have ruled that portions of the Federal Rules of Criminal Procedure, the National Security Act of 1959, the Internal Revenue Code, and the Privacy Act are "exempting statutes" for the purposes of Exemption 3.³⁹

EXEMPTION 4. -- "Trade secrets and commercial or financial information obtained from a person and privileged or confidential" may be withheld under Exemption 4.

This exemption has been cited in attempts to withhold information about university research,⁴⁰ but the District of Columbia Court of Appeals rejected such reasoning, at least as it applies to grant applications, research progress reports, and any research designs they may contain. The court ruled in Washington Research Project that university and other non-profit researchers generally lack the commercial interest necessary for information about their research to be sheltered from mandatory disclosure by Exemption 4.

It is clear enough that a noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce. This is not to say that the scientist may not have a preference for or an interest in nondisclosure of his research design, but only that it is not a trade or commercial interest.⁴¹

Researchers do have an interest "founded on professional recognition and rewards," but the mandate that the FOIA's exemptions be construed narrowly⁴² prevented the court from extending the definition of commercial information "by analogies that lead so far away from the plain meaning of Exemption 4." Therefore, the court held that "research designs submitted in grant applications are not exempt from disclosure under the Act. This holding extends to all types of applications -- initial, continuation, supplemental, and renewal -- and to progress reports made by grantees as part of the last three kinds of applications."⁴³

The Washington Research Project ruling did not preclude the possibility that a researcher at a non-profit university might have a valid commercial interest that would qualify information for Exemption 4 protection from disclosure. Indeed, it has been suggested that reports of patentable inventions might be exempt from mandatory disclosure.⁴⁴ However, the burden of showing such an interest is on the agency in possession of the information.

Even if there were such an interest, the agency could decide to disclose the information in response to an FOIA request. In that case, given "the similarity of language between Exemption 4 and the substantive portions of (the Trade Secrets Act)," the submitter of information could almost certainly ask a federal court to review the agency's decision to disclose the information, the Chrysler court ruled.⁴⁵

EXEMPTION 5 -- Pre-decisional memoranda may be withheld under Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Washington Research Project provides the most definitive guidance to date as to the reach of Exemption 5 in connection with information about university research. Although the court ruled that grant applications and progress reports must be disclosed, it also held that documents emerging from the peer-review process may be kept secret. Site visit reports or summary statements prepared by outside consultants hired to evaluate research grant applications or progress reports are exempt from mandatory disclosure as "intra-agency memoranda not subject to discovery in litigation," the court said.

The court relied on EPA v. Mink, in which the Supreme Court ruled that Exemption 5 does not allow withholding "purely factual, investigative matters," but does allow "materials reflecting deliberative or policy-making processes" to be kept secret.⁴⁶

The Washington Research Project ruling was consistent with the Fifth Circuit Court of Appeals' decision in Wu v. National Endowment for the Humanities, in which the court upheld the agency's decision not to let an unsuccessful grant applicant examine the confidential evaluations of his research proposal.⁴⁷ Both decisions suggest a judicial sensitivity to the need to protect the peer-review process and its ideally uninhibited flow of ideas and opinions from the potentially chilling effects of mandatory disclosure. In general, federal courts have allowed agencies to keep secret the deliberative communications of outside consultants.⁴⁸

EXEMPTION 6 -- This exemption allows the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Specific judgments about a researcher's competence generally are exempt under Exemption 5, discussed above. The factual results of such judgments, however, are not exempt from mandatory disclosure.

Last year, for example, the First Circuit Court of Appeals ruled that the names and addresses of unsuccessful applicants for National Cancer Institute

grants were not "personnel, medical or similar" files within the meaning of Exemption 6.⁴⁹

"Federal grant applicants cannot reasonably expect that their efforts to secure government funds, especially in a field so much in the public eye as cancer research, will remain purely private matters," the court said. "There is an obvious public element to the process and its results."⁵⁰

Only matters "of an intimate personal nature" may be kept secret under Exemption 6.⁵¹ Much of what is commonly considered to be "personnel information" must be disclosed. As the Supreme Court noted in Air Force vs. Rose: "We find nothing in the wording of Exemption 6 or its legislative history to support the agency's claim that Congress created a blanket exemption for personnel files."⁵²

Disclosure of scientific information conceivably could invade the privacy of human subjects of research, which could bring Exemption 6 into play. However, names and other personally identifiable information usually can be deleted from documents, which would remove Exemption 6 objections to disclosure.

EXEMPTIONS 7, 8, and 9 -- These provisions allow withholding investigatory records compiled for law-enforcement purposes, material dealing with the regulation of financial institutions, and geological and geophysical information about wells, respectively. There is no controversy over their applicability to demands for access to university research information.

For example, although much university research deals with crime, police or prisons, it is almost inconceivable that a research project would have a direct law-enforcement role. If a professor's research did help authorities bring a criminal to justice, pertinent details about the research would probably become public at the trial, even though Exemption 7 might shield such information until then.

With respect to Exemption 8, it's possible that university faculty might be involved on a part-time basis in evaluating banks for some federal agency.

Such activity -- though perhaps helpful to a faculty member in his or her research -- is not itself research. Little if any actual research information could be withheld under Exemption 8.

If university geologists and geophysicists submit information about wells to the government, Exemption 9 authorizes the government to withhold it from the public. The extent of such submissions is difficult to determine, but the language of the exemption is unambiguous, and has never come before a federal court for interpretation.

DISCUSSION

As noted earlier in this paper, Washington Research Project and the implications that flowed from it alarmed the scientific community. Forsham v. Harris, a narrow decision, did little to allay the scientists' fears.

It's impossible to say that such fears are groundless. Although there's no hard evidence that the FOIA has been used by unscrupulous scientists to "steal" the research ideas of others, plagiarism and outright fabrication of data are not unknown in the high-pressure, high-stakes world of big-league university research.⁵³ In Washington Research Project, for example, the agency that wanted to withhold information went to "some pains to argue that biomedical researchers are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field," the court noted.⁵⁴

Despite the fears of some scientists, however, it's difficult to see how the modest disclosure requirements of Washington Research Project -- that only grant applications and progress reports must be disclosed -- would necessarily lead to widespread piracy of ideas. The Supreme Court's Forsham v. Harris ruling makes it clear that raw data and other materials describing the inner workings of research projects are disclosable only if a federal agency actually has possession of them.

In addition, although the issue has never been addressed in an FOIA case, it has been suggested that forced disclosure of raw data and other sensitive university research information may infringe upon the researchers' academic freedom rights. The Seventh Circuit Court of Appeals, deciding recently not to compel university researchers to comply with an exceedingly broad subpoena for raw data and other material, stated that the researchers' "interest in academic freedom may properly figure into the legal calculation of whether forced disclosure would be reasonable."⁵⁵

In sum, scientists who want to protect sensitive information from public disclosure can apparently do so if they merely keep it out of documents submitted to the federal government. The sensitive information could be circulated within the peer-review process, which is clearly immune from public view.

Grant applications and progress reports, in other words, are all that's generally available to science reporters who use the FOIA in an effort to find out about university research. Although reporters might prefer to have total access to information generated by university research projects, half a loaf is better than none. And even half a loaf can be useful at times.

For example, scientists may sometimes be uncooperative because they believe, rightly or wrongly, that a reporter won't understand enough about their research to be able to produce a coherent story. A reporter who reviewed grant applications and progress reports, however, not only might learn something about the project but also might convince the reluctant scientist that the reporter is seriously interested in accuracy.

In many cases, the grant applications and progress reports by themselves may supply enough information for a story. After all, most reporters have neither the time nor the need to examine raw research data. In the end, given the choice between a story about their research without their comments and a story including them, most scientists would probably choose the latter.

Reporters who routinely review grant applications and progress reports may also find newsworthy matters they didn't know about. Obviously, reporters can't scrutinize all reviewable documents, but periodic looks at titles of grant applications and progress reports in certain areas of interest -- military or cancer research, for example -- can be fruitful.⁵⁶

Finally, most states have open records laws. These laws generally apply to public universities, and in many cases may be more effective than the federal FOIA in prying information loose from a university.

In the best of all possible worlds, scientists would be eager to share information with reporters and others who were interested enough to ask about it. Reality often fails to fit that ideal, though, and in such cases the federal FOIA, while not a particularly powerful tool, can sometimes be of at least limited use.⁵⁷

FOOTNOTES

1. Kim McDonald and Cheryl Fields, "Scientific Research," The Chronicle of Higher Education, Feb. 17, 1982, p. 18.
2. The focus of this paper is limited to the application of the FOIA to research information at universities. This specific topic is part of a much broader debate about access to science information. For a brief but fairly current overview of the issues, see Dorothy Nelkin, "Intellectual Property: The Control of Scientific Information," Science 216:704-708 (May 14, 1982).
3. See, for example, Sharon Dunwoody and Byron Scott, "Scientists as Mass Media Sources," Journalism Quarterly 59:52-59 (Spring 1982).
4. About two-thirds of the money spent annually on university research comes from the federal government. See the testimony of Jesse Lasken, of the National Science Foundation, before the Subcommittee on Monopoly and Anti-competitive Practices of the Senate Small Business Committee on May 22, 1978. Hearings, p. 267.
5. Editorial, Milwaukee Journal, Sept. 12, 1978.
6. Branzburg v. Hayes, 408 U.S. 665, 707 (1972).
7. Houchins v. KQED, 438 U.S. 1, 9 (1978). See also Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) and Pell v. Procunier, 417 U.S. 817 (1974).
8. Houchins, supra, at 12.
9. Potter Stewart, "Of the Press," 26 Hastings Law Journal 631, 631 (1975).
10. 5 U.S.C. 552.
11. Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974).
12. 421 U.S. 963 (1975).
13. "Disclosure of Research Information: Report of the President's Biomedical Research Panel," p. 2. The report was submitted to the House Committee on Interstate and Foreign Commerce and to the Senate Committee on Labor and Public Welfare on June 30, 1976.
14. "Disclosure of Research Information under the Freedom of Information Act," submitted to the Senate Subcommittee On Health, to the House Subcommittee on Health and Environment, and to the Secretary of Health, Education, and Welfare on April 8, 1977.
15. Ibid., pp. 7-12.
16. See, for example, Paul Fisher, "Reagan FOIA Proposals Would Change Little," FoI Digest, vol. 23, no. 5, p. 8 (September-October 1981).

17. A brief discussion of the Administrative Procedure Act of 1946 and its shortcomings can be found in Donald Gillmor and Jerome Barron, Mass Communication Law: Cases and Comment (St. Paul: West Publishing Co., 1974), pp. 525-528.
18. EPA v. Mink, 410 U.S. 73, 79-80 (1973).
19. 5 U.S.C. (b) (1)-(9).
20. See Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), and Getman v. NLRB, 450 F.2d 670, 672 (D.C. Cir. 1971), stay denied, 404 U.S. 1204 (1971).
21. Forsham v. Harris, 445 U.S. 169, 185-186 (1980).
22. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975); Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 153 (1980).
23. Forsham, supra, at 176, n. 6.
24. Forsham, supra, at 185; Kissinger, supra, at 157.
25. 41 CFR 101-11.401-3 (d) (1979).
26. Forsham, supra, at 183, n. 14.
27. In Air Force v. Rose, 425 U.S. 352 (1976), for example, plaintiffs sought information about disciplinary actions at the Air Force Academy. There was no dispute that the academy was an agency subject to the provisions of the FOIA.
28. Forsham, supra, at 180. Also, United States v. Orleans, 425 U.S. 807, 818 (1976). See also Mason, "Current Trends in Federal Grant Law: Fiscal Year 1976," 35 Fed Bar 163, 167-168 (1976): "The grant is assistance to an autonomous grantee. The grantee is not an arm, agent or instrumentality of the grantor. The employees of the grantee are not federal employees. The torts of the grantee are not federal torts. The property of the grantee is not federal property." Some scholars, however, argue that federal grantees should be considered agencies for FOIA purposes. See, for example, Note, "The Definition of 'Agency' under the Freedom of Information Act as Applied to Federal Consultants and Grantees," 69 Georgetown Law Journal 1223 (1981).
29. Forsham, supra, at 177, n. 7.
30. Kim McDonald, "Proposed Changes in Secrecy Rules Alarm Scientists," The Chronicle of Higher Education, March 17, 1982, pp. 1, 12.
31. See, for example, Steve Burkholder, "Pentagon quietly returns to college laboratories" and "Checking your local campus: Sifting through research records to decipher the amount of involvement," both in The IRE (Investigative Reporters and Editors) Journal, vol. 4, no. 3, p. 15 (summer 1981). The articles originally appeared in The Progressive, June 1981. See also Kim McDonald, "Pentagon Asked to Develop a Clear Policy on Release of University Research Data," The Chronicle of Higher Education, March 17, 1982, p. 11.

32. Air Force v. Rose, *supra*, at 369.
33. Air Force v. Rose, *supra*, at 369-370.
34. H.R. Rep. No. 1497, 89th Cong., 2d Session, p. 10 (1966). Fisher, *op cit.*, notes that exempting statutes "have multiplied beyond any sure count since the FOIA was turned from toothless to tiger by the 1974 amendments."
35. 18 U.S.C. 1905.
36. Chrysler Corp. v. Brown, 441 U.S. 281, 292-293 (1979).
37. Chrysler, *supra*, at 318.
38. 5 U.S.C. 706.
39. With respect to the Federal Rules of Criminal Procedure, see Fund for Constitutional Government v. National Archives and Records Services, 656 F.2d 856 (D.C. Cir. 1981); the National Security Act of 1959, see Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979); the Internal Revenue Code, see Neufield v. Internal Revenue Service, 646 F.2d 661 (D.C. Cir. 1981); the Privacy Act, see Painter v. FBI, 615 F.2d 689 (5th Cir. 1980), Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), cert. denied 444 U.S. 1013 (1980), and Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980). Recent Exemption 3 developments are discussed in detail in Comment, "Developments under the Freedom of Information Act -- 1980," 1981 Duke Law Journal 338, 359-367.
40. See, for example, Washington Research Project, *supra*. See also "Patentable Material and the Freedom of Information Act," Congressional Record, May 19, 1978, pp. S7881-7883.
41. Washington Research Project, *supra*, at 244-245.
42. See cases cited at n. 20.
43. Washington Research Project, *supra*, at 245.
44. See "The Applicability of Exemption Four of the Government-in-the-Sunshine Act and the Freedom of Information Act to NIH Peer Review Meetings and Invention Disclosures Pursuant to Institutional Patent Agreements," a memo from the American Law Division of the Congressional Research Service to the Senate Subcommittee on Monopoly and Anticompetitive Practices, May 8, 1978.
45. Chrysler, *supra*, at 319, n. 49. See also Thomas McGarity and Sidney Shapiro, "The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies," 93 Harvard Law Review 837 at 860, n. 118, (1980).
46. EPA v. Mink, *supra*, at 89.
47. Wu v. NEH, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973).

48. See, for example, Ryan v. Justice, 617 F.2d 781 (D.C. Cir. 1980); Hoover v. Interior, 611 F.2d 1132 (5th Cir. 1980); and Madison County v. Justice Department, 641 F.2d 1036 (1st Cir. 1981). See also Note, "The Freedom of Information Act and the Exemption for Intra-agency Memoranda," 86 Harvard Law Review 1047, 1063-66 (1973).
49. Kurzon v. Health and Human Services, 649 F.2d 65 (1st Cir. 1981).
50. Kurzon, supra, at 69.
51. Sims v. CIA, 642 F.2d 562, 573-4 (D.C. Cir. 1980).
52. Air Force v. Rose, supra, at 371.
53. See, for example, Morton Hunt, "A Fraud That Shook the World of Science," New York Times Magazine, Nov. 1, 1981, p. 42.
54. Washington Research Project, supra, at 244.
55. Dow Chemical v. Allen, 80-2013, p. 24 (7th Cir. 1982). See also Richards of Rockford v. Pacific Gas and Electric, 71 F.R.D. 388 (N.D. Cal. 1976).
56. For example, David Pritchard, "UW radiation study is somber news about Seafarer," Madison (Wis.) Capital Times, Feb. 15, 1978, p. 1.
57. A good primer on the FOIA is Peter Lovenheim and Jack Landau, How to Use the Federal FOI Act (Washington: FOI Service Center, 1980).